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ALEXANDER L. STEVAS,
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No. 82-2146

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

MASHPEE TRIBE,
Petitioner,

v.

NEW SEABURY CORP., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the Court of Appeals decision that there was no justification for recalling mandate and reconsidering the four year old judgment issued in the instant case.

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STATEMENT OF THE CASE

This is an attempt to reopen at the appellate level a seven year old case decided adversely to the instant petitioner in the trial court. The original complaint was filed on August 26, 1976, by a group of individuals calling themselves the Mashpee Tribe, who alleged that they had been illegally deprived of their land through the acts of the Massachusetts General Court in 1869 and 1870. Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940 (D. Mass. 1978), aff'd sub. nom., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979). (Mashpee I). The Commonwealth participated in that case primarily as one of many land owners whose title to property was called into question.

Mashpee I was submitted to a jury after forty days of trial on the issue of whether the plaintiffs or their ancestors were an Indian tribe within the meaning of the Non-Intercourse Act. The jury, answering special questions, concluded that a Mashpee Tribe did not exist at certain crucial dates, including: July 22, 1790, when the Non-Intercourse Act was first enacted; June 23, 1869, the date on which the Massachusetts General Court removed all restraints on the alienation of Indian land in Massachusetts; May 28, 1870, when the General Court incorporated the Town of Mashpee; or August 26, 1976, the date of the filing of the complaint.

The defendants moved for dismissal upon the return of the jury's verdict. The court held that the evidence sup-

ported the jury's finding that the Mashpees did not constitute an Indian tribe in 1870 or 1976. Therefore, the case was dismissed. The Court of Appeals affirmed that decision, 592 F.2d 575 (1st Cir.), and this Court thereafter denied certiorari, 444 U.S. 866 (1979).

In 1981, three hundred and thirty-four individuals claiming to be members of the alleged Mashpee Tribe filed a new action in the district court.[1/] Despite the decision in Mashpee I, the claim for relief once again relied on the assertion that their rights under the Non-Intercourse Act had been violated by the acts of the Massachusetts General Court in 1869 and 1870. On June 30,

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1/ In the Mashpee I proceeding, the plaintiffs were represented by Thomas Tureen of the Native American Rights Fund. The second Mashpee case was filed by Robert Hahn, as was the Motion to Vacate Judgment which is at issue in this petition.

1982, the District Court issued its memorandum and order granting the various defendants' Motions to Dismiss. Those motions contended, and the trial court held, that the second cause of action was precluded by the first. Seven days later final judgment was entered. Mashpee Tribe v. Watt, 542 F.Supp. 797 (D. Mass. 1982). Thereafter, the First Circuit Court of Appeals upheld the dismissal on appeal. Mashpee Tribe, 707 F.2d 23 (1st. Cir. 1983). No petition for certiorari has as yet been filed.

On January 28, 1983, Mr. Hahn filed a motion in the First Circuit seeking to vacate the 1979 judgment affirming the dismissal in the Mashpee I case. The petitioner has not, however, filed a motion for post-judgment relief in the

district court. The First Circuit reviewed the tendered motion and found no justification for recalling their mandate. The Court directed the clerk to return the papers without filing. The petitioner then filed this petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not raise any special or important issues that warrant certiorari review. The petition raises no important questions of federal law. It does not present for review a decision which conflicts with any decision of this Court or any other federal court of appeals. Instead, the petitioner contends only that the Court of Appeals erred when it refused to reopen, at the appellate level, a seven year old land

title case decided adversely to it. In fact, the First Circuit's decision was sound and correct, because the petitioner's motion, filed nearly four years after entry of judgment, is time-barred under any rule authorizing post-judgment remedies.

First, post-judgment remedies in the Court of Appeals consist of motions for rehearings and rehearing en banc. Either motion, however, must be filed within fourteen days after entry of judgment. F.R.A.P. 40(a). That date has long since passed.

Second, it is telling that the petitioner filed its motion for post-judgment relief in the appellate court rather than in the district court as provided by Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure. This decision

was based no doubt on the fact that petitioner's motion was time-barred under either rule. Rule 59(e) requires that the motion to alter judgment be filed not later than ten days after entry of judgment. Petitioner is foreclosed from proceeding under that rule.

Similarly, the provisions of Rule 60(b) do not support the petitioner's motion. That rule provides that a motion premised on the first three enumerated grounds be made within a year after judgment; once again, petitioner faces an insurmountable time barrier. Nor can the petitioner find solace in the remaining provisions of Rule 60(b) which require the motion to be filed within a "reasonable" time. An unexplained four year delay in filing is simply not reasonable.

This is especially true where petitioner seeks to relitigate questions which affect title to land.[2/] In cases concerning real property, notions of finality and res judicata are "at their zenith" and, "when once decided, should be considered no longer doubtful or subject to change." Nevada v. United States, ___ U.S. _____, 51 U.S.L.W. 4974, 4979 (July 21, 1983). The mere fact that the petitioner claims to be an Indian tribe does not excuse it from these traditional notions of finality. Such a claim was firmly rejected by this court in Heckman v. United States, 224 U.S. 412 (1912)

2/ Moreover, the petitioner had the opportunity to brief and argue the issues it now seeks to relitigate, in the Mashpee II litigation. In essence, petitioner seeks not a second, but a third bite at the apple. Notions of finality demand that such an attempt be rejected.

and most recently reiterated in Nevada v. United States, supra.

Finally, assuming the motion was filed within a "reasonable" time, the petitioner's motion still does not satisfy the primary requirement of Rule 60(b) that there be justification for relief. The petitioner offers but a single reason to justify the request that this extraordinary remedy be granted; the fact that petitioner's counsel in the original proceeding failed to litigate the case in the manner present counsel would have chosen. This Court, as well as numerous courts of appeal, has rejected that very contention as a justification for the recall of a mandate. Ackerman v. United

States, 340 U.S. 193 (1950).[3] Thus, even were petitioner's motion not time-barred, as it clearly was, it was without sufficient merit to justify the extraordinary relief it sought.

3/ Accord, Federal, Inc. v. Edmonton Inn Co., 555 F.2d 577 (6th Cir. 1977); Couch v. Traveler Ins. Co., 551 F.2d 958 (5th Cir. 1977); Willens v. University of Massachusetts, 570 F.2d 403 (1st Cir. 1978).

CONCLUSION

The petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

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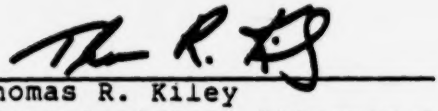

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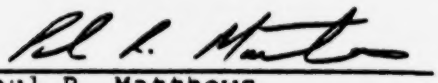

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